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No. 93-848

In the Supreme Court of the United States

October Term, 1993

STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

FRANK BURNABY,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, the Standard Fire Insurance Company, pursuant to rule 15.6 of the *Rules of the Supreme Court of the United States,* submits this brief in response to the opposition brief filed by respondent Frank Burnaby on or about December 23, 1993. It is respecfully urged that certiorari should be granted to resolve the important consti-

tutional issue presented by the petitioner. Mr. Burnaby has not demonstrated, in his opposition brief, any infirmity in the contentions of the petitioner.

I.

The Respondent Has Virtually Conceded the Petitioner's Contentions Concerning the Applicable Law, as Well as Conceding the Petitioner's View of the Facts, Leaving Only the Question of the Adequacy of the Purported Notice of the Claim of "Fraud."

Plaintiff Frank Burnaby, the respondent in this court, has filed a terse, two page opposition brief, in accordance with rule 15.1 of the *Rules of the Supreme Court of the United States*. Among other things, rule 15.1 provides that "the brief in opposition should address any perceived misstatements of fact or law set forth in the petition." The rule also admonishes attorneys for respondents that "they have an obligation to the Court to point out any perceived misstatements in the *brief in opposition*, and not later." (Emphasis in original.)

As to the applicable law, the plaintiff does not dispute anything stated by the defendant and petitioner. He appears to concede that notice is an essential component of due process of law; that the required notice must be adequate to give the defendant in a civil proceeding sufficient information to be able to defend himself; that the notice must include fair warning concerning the requirements of the law; that notice of factual charges concerning the particular claimed wrongful conduct of the defendant in

a civil matter must be set forth in the plaintiff's pleading; and that the notice must be given before the end of trial. Since the plaintiff does not dispute these basic principles, and indeed does not analyze the law at all, it must be deemed that these principles are conceded by the plaintiff.

As to any possible misstatement of fact, there is very little in the short opposition brief. Although it is asserted that the petition for a writ of certiorari is "based on fiction," the plaintiff does not explain how this is so. He does not take issue with any factual matter asserted in the petition. Rather, he simply quotes three sentences, which are repeated in three places in his second amended complaint. The same sentences are, of course, already quoted in the defendant's petition for a writ of certiorari (at page 8).

The plaintiff does not really dispute the defendant's view of the facts. Rather, he disputes the legal effect of the three quoted sentences, of which only a single word, "fraudulent," is even relevant.

The issue before this Court is, therefore, whether the insertion of the word "fraudulent," in a boilerplate characterization of the defendant's conduct, is constitutionally sufficient to put the defendant on notice of a massive claim for punitive damages based on "fraud." The plaintiff contends that it is sufficient, even though no "fraud" cause of action was asserted, and even though no facts constituting fraudulent conduct, however defined, are alleged in the operative pleading of the plaintiff.

II.

The Operative Complaint of the Plaintiff Did Not Give Constitutionally Sufficient Notice of His Claim for Punitive Damages Based on "Fraud."

Since the filing of defendant's petition for a writ of certiorari, this Court has reaffirmed the principle that notice is an essential part of the concept of due process of law. In *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S.Ct. 492 (1993), this Court ruled that the government, in a civil forfeiture case, may not seize real property "without first affording the owner notice and an opportunity to be heard." ___ U.S. at ____, 114 S.Ct at 497. Citing the seminal case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), and other authorities, the majority observed that "[o]ur precedents establish the general rule that individuals must receive notice and an opportunity to be heard" before they are deprived of property. ____ U.S. at ____, 114 S.Ct. at 498. In fact, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." ____ U.S. at ____, 114 S.Ct. at 500. According to the plaintiff here, in his opposition brief, the fundamental constitutional right to notice may be satisfied by the mere insertion of the epithet "fraudulent" in a string of epithets characterizing the defendant's conduct, without reference to any specific facts involving any type of "fraud." Such a position is untenable.

A defendant who is merely told that his conduct is "fraudulent" has no way of knowing the charges against which he must defend himself, where there is no fraud

cause of action. In the present case, the adjective "fraudulent" was attached to causes of action for breach of the covenant of good faith and fair dealing, violation of the statutory duty to settle claims, and breach of fiduciary duty. None of these causes of action included any allegation with respect to any material misrepresentation of fact, any intent to defraud, or any detrimental reliance. There never was any claim by the plaintiff that the defendant said anything with the intention of depriving the plaintiff of his property or his legal rights. Certainly a party charged with "fraud" has the constitutional right to know the factual basis of the claim. Moreover, a defendant should be given notice that a state's punitive damages statute may be interpreted to allow recovery of such damages based on a finding of "fraud," without the plaintiff being required to plead or prove a cause of action for "fraud," where the statute has never been so interpreted in the long history of the statute, stretching back more than a century.

It is respectfully submitted that the mere insertion of the word "fraudulent," in a rather prolix pleading, is insufficient to satisfy the constitutional requirement of notice. As this Court held in *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950), the requirement of notice is not simply notice of the pendency of a legal proceeding. Rather, the notice must be sufficiently specific that the party receiving it is able to act in the protection of that party's interests. In *Mullane*, for example, the notice given of a probate hearing was deemed constitutionally defective, because it did not refer to the right of the beneficiaries to have a trustee answer for negligence, and it did not advise the beneficiaries that their recoveries might

be diminished by attorney's fees that could be challenged. 339 U.S. at 313.

In the present case, there was a very long trial. No question of "fraud" came up at any time, until the trial was almost over. The defendant had never been called upon to defend itself against any claim of "fraud." No such cause of action was ever submitted to the jury. The defendant's constitutional right to notice was thus violated, when punitive damages were awarded based on a finding of "fraud."

In his opposition brief, the plaintiff asserts that the defendant "is plainly unhappy with the judgment rendered against it." (Page 2.) This statement is true. No defendant is ever pleased with a massive award of punitive damages based on violation of constitutional rights.

The plaintiff also asserts that the judgment in his favor was found "appropriate" by three levels of state courts. (Opposition brief, page 2.) This statement is not quite correct. The Supreme Court of California was apparently alarmed and embarrassed by the interpretation placed by lower courts on the state's punitive damages statute, and it thus "depublished" the opinion of the Court of Appeal, thereby suppressing it.

In his opposition brief, the plaintiff has simply ignored the contentions of the defendant with respect to the crisis created by escalating punitive damages awards. Nonetheless, this Court should not ignore the crisis, particularly where it is caused by violation of the constitutional rights of defendants.

III.

Conclusion.

This Court should grant the defendant's petition for a writ of certiorari, so that it may consider the narrow, but important, constitutional issue presented by this case. In his opposition brief, the plaintiff has virtually conceded everything that the defendant argues, except for the issue of the legal effect of his inclusion of the epithet "fraudulent" in his pleading. The defendant earnestly contends that the use of this word, by itself, is insufficient to constitute notice of a claim for massive punitive damages, under the circumstances of this case.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL, and
Roy G. Weatherup

Attorneys for Petitioner
STANDARD FIRE INSURANCE COMPANY

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on January 10, 1994, I served the within *Reply to Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 10, 1994, at Los Angeles, California.

Betty J. Malloy
(Original Signed)